

**\*\*No copy of this transcript may be made prior to September 3, 2023\*\***

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

DREWNIAK, ET AL.,

Plaintiffs,

20-cv-852-01-LM

v.

February 15, 2023

U.S. CUSTOMS AND BORDER  
PROTECTION, ET AL.,

11:07 a.m.

Defendants.

\* \* \* \* \*

MOTION HEARING

BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

For the Plaintiffs: Gilles R. Bissonnette, Esquire  
Harrison Stark, Esquire

For the Defendants: Anna Dronzek, AUSA  
Indraneel Sur, Esquire

Court Reporter: Molly K. Belshaw, LCR, RPR  
Duffy & McKenna Court Reporters  
P.O. Box 1658  
Dover, NH 03821  
(800) 600-1000

P R O C E E D I N G S

THE CLERK: For the record, court is now in session. This is a motion hearing, a motion to compel and dismiss in Drewniak et al. v. U.S. Customs and Border protection et al. It is 20-cv-852-01-LM.

If lead counsel who will be speaking today would identify themselves for the record, please.

MR. BISSONNETTE: Thank you, Your Honor. Gilles Bissonnette on behalf of Plaintiffs Jesse Drewniak and Sebastian Fuentes. I'll be arguing most of the aspects of the two motions with the exception of the APA claim and the motion to dismiss, which will be handled by my colleague. And I'll introduce Harrison Stark from the ACLU of Vermont.

MR. STARK: Morning, Your Honor. Harrison Stark on behalf of Mr. Drewniak and Mr. Fuentes.

THE COURT: Good morning.  
Government?

MS. DRONZEK: Good morning (audio cut out) -- good morning, Your Honor. My

1           apologies.

2           I am Anna Dronzek. I am here to address  
3           the motion to compel, and also here speaking on  
4           behalf of the Government and his attorney,  
5           Indraneel Sur, who will be arguing the motion  
6           to dismiss.

7           THE COURT: Okay. Thank you all very  
8           much. It's nice to see everybody.

9           Let's go ahead and start with the motion  
10          to dismiss. And I'm thinking what I'd like to  
11          do is hear counsel uninterrupted -- and I'll  
12          try to let you speak without being interrupted,  
13          and follow up with questions -- and give you  
14          ten or 15 minutes, really, to tell me your  
15          best, strongest arguments. I'm listening  
16          carefully. I've read everything. And I'll be  
17          interested to see what you think your strongest  
18          arguments are, and put those front and center  
19          for me.

20          And then I'll look for, I guess,  
21          Attorney Bissonnette to respond. And then I'll  
22          give you both a brief rebuttal, and then we can  
23          move to the motion to compel. All right.

24          So that would be, then, Attorney Sur. If  
25          you would like to give me your strongest

1 arguments with respect to the motion to  
2 dismiss.

3 MR. SUR: Thank you, Your Honor, and may  
4 it please the Court. The most straightforward  
5 grounds for dismissing the amended complaint is  
6 that plaintiffs lack Article III injury in fact  
7 for the prospective relief that they seek here,  
8 which is an injunction and a declaration.  
9 That's because they have no certainly impending  
10 harm from these future checkpoint operations of  
11 the kind that Plaintiff Drewniak experienced in  
12 the past. And we've certainly briefed on other  
13 issues, but the lack of certainly impending  
14 harm alone is sufficient to grant the motion to  
15 dismiss under Rule 12(b)(1) grounds.

16 So the Government's two declarations  
17 supporting the Rule 12(b) motion, which are not  
18 controverted -- that shows there have been no  
19 checkpoints in New Hampshire in 2020 or in  
20 2021. And although the correct focus is on  
21 December 2021, when the amended complaint was  
22 filed, even in 2022, there's no current  
23 checkpoint in Woodstock which could be used  
24 even to measure whether Plaintiffs have a  
25 certainly impending harm.

1           And the declarations explain how three key  
2           characteristics of the temporary interior  
3           checkpoints underlying Plaintiff Drewniak's  
4           August 2017 encounter were no longer present by  
5           the time the Plaintiffs filed the amended  
6           complaint in December 2021. And, again, just  
7           to reiterate, that's the key date. Because the  
8           amended complaint superseded the original  
9           complaint.

10           First, the operations orders authorizing  
11           the checkpoints in 2017 and, subsequently, in  
12           2018 and 2019, have expired. Second, the state  
13           police ended their practice of providing a  
14           continuous presence at border patrol  
15           checkpoints of the kind that the Plaintiff  
16           Drewniak experienced. And, third, the border  
17           patrol changed its policies so that it ended  
18           that surrendering of seized personal-use  
19           marijuana to state police for potential  
20           criminal proceedings that Plaintiff Drewniak  
21           described.

22           So by the time the Plaintiffs voluntarily  
23           filed their amended complaint on December 2021,  
24           Plaintiff Drewniak had no certainly impending  
25           harm from anticipated future checkpoint

1 operations based on that past experience in  
2 2017. And that's even more true for the newly  
3 added plaintiff Fuentes, who never underwent  
4 any criminal process. Indeed, the officers at  
5 the checkpoints he encountered never even  
6 referred him for secondary inspection at any  
7 checkpoint.

8 So one aspect that I think is maybe worth  
9 underscoring is that the case concerns  
10 temporary, and not permanent, checkpoints. So  
11 from the Plaintiff's perspective, there have  
12 been many allegations about their repeated  
13 travel in the Woodstock area. But for the harm  
14 that gave rise to Plaintiff Drewniak's 2017  
15 checkpoint encounter to recur, it can't be  
16 enough to describe an intention to travel in  
17 the vicinity of Woodstock where there was a  
18 previous checkpoint, because travel in the area  
19 alone wouldn't lead to a checkpoint encounter  
20 unless the border patrol, at some undetermined  
21 time in the future, actually established a  
22 checkpoint there. And that would be a matter  
23 of guesswork.

24 "Guesswork" isn't our term, Your Honor.  
25 It's a term that the Court used in -- the

1 Supreme Court used in *Clapper v. Amnesty*  
2 *International* as a way of urging caution in  
3 this area where certainly impending harm is  
4 concerned. And beyond speculating about the  
5 location of the checkpoint, as we explained in  
6 the briefs, for the harm that Mr. Drewniak  
7 experienced in August of 2017 to recur, there  
8 would also have to be further events that are,  
9 again, a matter of speculation.

10 The border patrol would have to, again,  
11 approve operations orders that authorize such  
12 checkpoints. The state police would have to  
13 change their practice, reverting to their  
14 previous practice of staffing a continuous  
15 presence at the hypothetical checkpoints. And  
16 the border patrol would also have to again  
17 resume, contrary to what's now the contraband  
18 practice, of surrendering -- they'd have to go  
19 back to this practice of surrendering the  
20 seized contraband to the state police for  
21 criminal proceedings.

22 So that is piling speculation on  
23 speculation. It's an attenuated chain of  
24 events that, consistent with *Clapper*, is beyond  
25 what is allowed for a plaintiff to say their

1 harm is certainly impending. And it's not  
2 sufficient to show harm for an injunctive  
3 relief claim under Article III.

4 Now, again, we've briefed a number of  
5 other issues. But in terms of the most  
6 straightforward ground for granting dismissal  
7 at this stage, on this amended complaint and on  
8 this record, we think the most straightforward  
9 way to do that is to rely on the absence of a  
10 sufficient showing of certainly impending harm  
11 to grant dismissal.

12 THE COURT: Thank you.

13 And, then, to the extent you want to  
14 assert any other arguments or be heard on them,  
15 I'm happy to hear that.

16 I'll let Attorney Bissonnette, then,  
17 respond to your front-and-center loaded  
18 argument on standing.

19 Go ahead, Attorney Bissonnette.

20 MR. BISSONNETTE: Thank you, Your Honor.

21 I do want to address some of the points  
22 that were raised by the Government, but I first  
23 want to address some of my key themes, which is  
24 I don't think this motion to dismiss is  
25 complicated. There's a lot of briefs that have

1       been filed since the amended complaint was  
2       issued. But when you strip away what I think  
3       is, frankly, a Government's effort to rewrite  
4       our complaint, rewrite our claims, rewrite the  
5       injury that is being alleged in this case,  
6       which is not the injury of being subjected to  
7       state law prosecutions. It's about the injury  
8       of being subjected to a detention without  
9       reasonable suspicion that a crime has occurred,  
10      which applies to everyone that goes through the  
11      checkpoints. And if you strip that away, I  
12      think this is, frankly, a straightforward  
13      analysis and not complicated.

14             The standing arguments presented by the  
15      Defendants here are not new. This Court has  
16      already addressed them, including the relevant  
17      standard. The real and only question before  
18      this Court, even assuming that standing and not  
19      mootness principles apply to Mr. Drewniak --  
20      which is a separate question that I know we  
21      have extensively briefed -- if whether, number  
22      one -- two points.

23             Number one, whether there's substantial  
24      likelihood that checkpoints will occur. And  
25      number two, whether there is substantial

1       likelihood that the specific plaintiffs here,  
2       Mr. Drewniak and Mr. Fuentes, will be ensnared  
3       in that. It's the same analysis that this  
4       Court went through back in 2021.

5               And even with Mr. Jesse Drewniak's changed  
6       circumstances, which I acknowledge -- we've  
7       submitted affidavits to that point, including  
8       an addendum -- life happens -- it happens for  
9       all of us, including me -- but even recognizing  
10      those changed circumstances, the standing facts  
11      here, I think, frankly, are equal to, if not  
12      stronger, than the allegations that existed  
13      back in the original complaint. And I want to  
14      explain why.

15             That's because here Mr. Sebastian Fuentes  
16      travels in this area with even greater  
17      frequency than what Mr. Drewniak alleged in the  
18      original complaint. He lives right next door  
19      to these checkpoints. And Defendants haven't  
20      disclaimed their ability, or, frankly,  
21      willingness, to conduct a checkpoint at any  
22      time without notice. So you hear the  
23      Government say a lot.

24             We just heard the remarks that "well, you  
25      know, it's speculative." They control that,

1 Your Honor. They decide when these checkpoints  
2 occur. So a situation that I think is not  
3 necessarily callable to the plaintiffs here is  
4 they're not disclaiming their ability to  
5 protect these checkpoints. This case goes away  
6 somehow, and these checkpoints occur tomorrow,  
7 which could happen.

8 The affidavits themselves, presented by  
9 the two Government witnesses, make clear "we  
10 could do these at any time." That is one of  
11 the fundamental concerns that we have. And  
12 that dynamic, frankly, existed back in the  
13 original motion to dismiss. And this Court, in  
14 fact, articulated, I think quite clearly, how  
15 the Government could potentially render this  
16 case nonjudicial.

17 What the Court said was there, Mr. Garcia,  
18 in the original affidavits, in the original  
19 motion to dismiss, "failed to explain the  
20 reason that no checkpoints are currently  
21 planned. He does not state that the agency has  
22 abandoned the use of checkpoints as an  
23 enforcements tool, nor does he state that the  
24 Agency lacks sufficient resources to conduct  
25 checkpoints. He merely states that erecting

1 checkpoints requires resources. In other  
2 words, his declaration provides no explanation  
3 for the lack of currently scheduled  
4 checkpoints."

5 We have the exact same issue here.  
6 Nothing has changed. The Court gave the  
7 Defendants guidance as to what to do,  
8 potentially even how to render this case less  
9 justiciable. They haven't heeded that  
10 guidance. So here we are, two years later,  
11 with the Government continuing, frankly, to  
12 indicate that they can conduct these  
13 checkpoints at any time.

14 So if the Defendants were to say today --  
15 if they were to say today that "Your Honor, no  
16 checkpoints -- there's not going to be an  
17 interior checkpoint -- temporary interior  
18 checkpoint in New Hampshire until  
19 January 2025" -- if they were to tell you that,  
20 if they were to put that in the affidavit, this  
21 case would be different. Perhaps we wouldn't  
22 be here. Perhaps this Court wouldn't have to  
23 resolve two motions of the -- particularly on  
24 the law enforcement privilege. The Court  
25 wouldn't have to resolve those questions.

1 Perhaps this case would be less justiciable  
2 than it is now. But they haven't done those  
3 things, even when the Court provided that  
4 guidance.

5 So there is a clear path. The Defendants  
6 haven't taken these steps pursuant to that  
7 path. But I don't litigate hypothetical  
8 academic problems. It's not worth my time;  
9 it's not worth the Court's time. But this  
10 isn't a hypothetical academic problem, where  
11 the Defendants won't say the things that it  
12 needs to say to render here the harm  
13 nonspeculative. And, add to that, the harm  
14 here is real with respect to both these clients  
15 and with respect to Mr. Fuentes, who lives  
16 right next door and, at least a couple times a  
17 week, travels through that checkpoint area.

18 So I do want to flag that even if this  
19 Court did think this was a close question on  
20 jurisdiction, and we don't think it is, that is  
21 precisely why discovery is necessary, including  
22 on jurisdiction. Discovery has been held up  
23 with respect to privilege claims that kind of  
24 seep into, probably, every relevant document in  
25 this particular case. But I do think that this

1 is a factual jurisdictional challenge that's  
2 being raised -- not, apparently, an adequacy  
3 challenge.

4 So what we have here is the Government  
5 presenting affidavits. And, I think, if that's  
6 the path that the Government wants to take,  
7 that can become part of discovery, just like  
8 merits discovery can occur. And this could be  
9 resolved, as with the merits, on motion for  
10 summary judgment or a bench trial, if  
11 necessary. I think that would be the prudent  
12 way to do it. As the Valentin court knows from  
13 the First Circuit, when factual jurisdictional  
14 challenges are raised, you have a minute's  
15 discretion in how to process those.

16 But I haven't deposed these two witnesses,  
17 because, I think, best practice is to wait  
18 until document discovery is complete, and  
19 that's clearly not complete yet. And I  
20 certainly would like that opportunity to talk  
21 to them about all the things that Your Honor  
22 raised in your April 2021 order that are not  
23 addressed in the affidavits that have been  
24 submitted to this Court in an effort to dismiss  
25 the second amended complaint.

1           So I want to go through, real quick, those  
2           two prongs that I talked about -- the  
3           substantial likelihood of the checkpoints  
4           recurring, number one. And, number two, the  
5           substantial likelihood of our clients being  
6           ensnared in those checkpoints. Because I just  
7           think that that's the analysis. And, again,  
8           this Court has looked at it. The standard  
9           already addressed by this Court -- I don't  
10          think there's any need, necessarily, to go  
11          into.

12          Again, number one, defendants haven't  
13          disclaimed their ability to do these  
14          checkpoints tomorrow. They say, which is an  
15          argument that could have been raised two years  
16          ago --

17          "Well, the operation orders have expired."  
18          The operation orders aren't a prerequisite to  
19          an established policy. They are part of the  
20          policy; right? Like, there's nothing that  
21          would prevent the Government from putting  
22          forward an operations order tomorrow to conduct  
23          a checkpoint here next week. So I think the  
24          notion here that the operations order has  
25          expired, and that somehow now makes this case

1 moot, which is the same scenario we were in  
2 two years ago -- I just don't think that holds  
3 water.

4 But, in addition, you have the changed  
5 practices that have been claimed by the State,  
6 that the State believes are no longer there,  
7 and that they've also ended the practice of  
8 seizing marijuana. As I said at the outset of  
9 my remarks, that is a straw man. That is  
10 irrelevant. It is irrelevant because it  
11 misunderstands the harm in our amended  
12 complaint -- again, an effort to rewrite our  
13 complaint.

14 The harm alleged is not the harm of being  
15 prosecuted for a state drug offense by state  
16 officials. That's not the harm in the  
17 complaint. Certainly, that occurred, but that  
18 is not the Fourth Amendment injury here. The  
19 Fourth Amendment injury is being subjected to a  
20 warrantless seizure by border patrol officials  
21 during a checkpoint that, in our view, is an  
22 unjustified intrusion on civil liberties. That  
23 harm falls on everyone who is ensnared in the  
24 checkpoints, regardless of whether that person  
25 is ultimately persecuted -- I'm sorry,

1 prosecuted for a state law drug offense or not.  
2 And that harm affects thousands of individuals.

3 And the Defendants concede -- I think, at  
4 least -- that these checkpoints all really  
5 occur in the same manner -- all ten of them in  
6 New Hampshire, insofar as border patrol agents  
7 inspect each vehicle with a K-9 that is tasked  
8 with searching for drugs, and that applies to  
9 everyone, and contraband is seized. It doesn't  
10 matter whether it leads to a state law drug  
11 prosecution, by the way, but contraband was  
12 seized. In one instance, it was seized by the  
13 feds and given to state officials. Since the  
14 McCarthy decision in 2018, the Defendants just  
15 take it; right?

16 So I just want to make clear that I do  
17 think that we have a little bit of a straw man  
18 argument here with respect to the changed  
19 circumstances that are being raised. And we do  
20 think that the policy itself is reflected in  
21 the fact that we've had ten checkpoints. And  
22 courts that have distinguished --

23 Lyons have said when you have an  
24 established policy, when you have a policy in  
25 place -- here, ten instances to pass -- an

1 instance can be an indicia of that -- then you  
2 can have standing to seek prospective  
3 injunctive and declaratory relief. This Court  
4 held that two years ago. We think the analysis  
5 is the same here.

6 Now, as to Mr. Drewniak and Mr. Fuentes --  
7 very quickly, again, as I acknowledged at the  
8 outset, Mr. Drewniak does have some changed  
9 circumstances. We disclosed it and thought it  
10 was critical and appropriate, frankly, to  
11 disclose that to the Court and to the  
12 Government. We don't think, though, it impacts  
13 his standing, mainly because his standing  
14 allegations, when you look at the Berner First  
15 Circuit case, we think, should be evaluated at  
16 the time of the original complaint.

17 If the Court has some discomfort with that  
18 based on what is in the current affidavits,  
19 again, he's had two trips in 2022 to the  
20 White Mountains, including traveling back  
21 through the checkpoint area. In July 2021 --  
22 these are all in affidavits -- he visited  
23 Mirror Lake near Wolfeboro. He went with his  
24 wife to Cannon Mountain as well in October of  
25 2021. So there is certainly past trips to the

1 area. But even, again, if there's some  
2 apprehension about his standing, Mr. Fuentes,  
3 we think, seals the deal for the plaintiffs.  
4 The original amended complaint does say he  
5 travels in that area virtually every day.

6 His situation has changed as well, and I  
7 just want to acknowledge that. He took a new  
8 job at Rising Democracy as a policy advocate.  
9 So it's not every day anymore, and we've  
10 disclosed that, appropriately so. But he does  
11 go there at least a couple times a week --  
12 through the checkpoint area. And, again, I  
13 think those allegations are far stronger, even,  
14 than Mr. Drewniak's from the original  
15 complaint.

16 Again, it's true that he wasn't subjected  
17 to criminal prosecution. That is irrelevant,  
18 in our view, for the reasons that we explained.  
19 So, with that, I'll close my remarks. I've  
20 probably gone on for longer than 15 minutes,  
21 Your Honor. But those are the points that I  
22 wanted to make.

23 Thank you.

24 THE COURT: All right.

25 Attorney Sur -- is it "Sur" or "Sur"?

1 MR. SUR: "Sur" is fine.

2 THE COURT: All right. Go ahead.

3 MR. SUR: Thank you, Your Honor.

4 So I appreciate my friend on the other  
5 side explaining their key points. Let me start  
6 with the significance of the operations orders.

7 They are not a triviality. And this  
8 notion that, somehow, just tomorrow there could  
9 be checkpoints, I think, is not supported by  
10 the record, as the Garcia declaration, in this  
11 round, carefully explains.

12 There are a number of process and  
13 substantive reviews and approvals that take  
14 place before a checkpoint operation, under  
15 these orders, and that's a very substantial way  
16 in which the declarations now differ from the  
17 record that was before the Court before.  
18 Having considered the Court's previous ruling,  
19 which, at that time, obviously, the Government  
20 moved to dismiss -- the Court denied that  
21 motion -- but the Government did -- while  
22 maintaining its view of the law, did look at  
23 the Court's ruling and consider the aspects  
24 that it could address more completely when the  
25 Plaintiffs amended their complaint.

1           And this new declaration from Chief Garcia  
2           does carefully describe the internal process  
3           checks that have to take place before these  
4           checkpoint operations begin. So while, as a  
5           rhetorical matter, it would be easier for the  
6           Plaintiffs to say that a checkpoint operation  
7           could occur tomorrow, that's simply not  
8           consistent with the record now. The case has  
9           changed, and this description of the operations  
10          orders makes clear that there would be a lot of  
11          process they would have to do to go on before  
12          there would be checkpoints.

13          The presentation by the Plaintiffs also  
14          shifts the focus in terms of where the time is.  
15          Just to underscore, we have an amended  
16          complaint here. It was voluntarily amended.  
17          And, so, consistent with the Supreme Court's  
18          observation in the Rockwell case, the First --  
19          sorry for the background noise -- the First  
20          Circuit precedence that we described in our  
21          brief says that when an amended complaint is  
22          filed, it supersedes the original complaint,  
23          and so that all motions would properly be  
24          directed to the amended complaint and not the  
25          original.

1           And, also, the approach, for example, that  
2           this Court took in the Freeman case, where it  
3           looked at the amended complaint but not events  
4           subsequent to the amended complaint, we think  
5           it's clear, in that sense, that the focus would  
6           be on the state of affairs in December 2021.  
7           And, at that point, there had been no  
8           checkpoints in 2020. There had been no  
9           checkpoints in 2021.

10           Now, the declarations that the Government  
11           filed with its motion to dismiss in March of  
12           2022 brought the picture forward up to fiscal  
13           year 2022, and stated that there would be no  
14           checkpoints in 2022. And there's been no  
15           allegation that there has been such a  
16           checkpoint. And then in preparation for this  
17           argument, CDP can represent to the Court that,  
18           also for fiscal year 2023, there are no  
19           checkpoints. So even if the Court were to sort  
20           of, if you will, widen the lens of the camera  
21           to encompass a period that goes forward from  
22           December 2021, there simply would not be a  
23           basis for concluding that there's certainly  
24           impending harm from this notion that these  
25           checkpoints could occur tomorrow.

1           Now, I appreciate, again, this point that,  
2           "Oh, well, the Government could do more to  
3           disclaim." As we explained in the briefs,  
4           there have been cases -- and we pointed to a  
5           case that has "Kemp Counsel" in the caption, I  
6           think, from the early 2000s -- where the First  
7           Circuit noted that when a prosecutor had  
8           advised a potential criminal defendant that the  
9           conduct -- the likely conduct of that defendant  
10          would not be within the statute that the  
11          prosecutor was feared to be enforcing, in that  
12          pretty particular scenario, a prosecutor's  
13          statement about that conduct not falling within  
14          the statute is a disclaimer that could defeat  
15          standing, I think, depending on the  
16          circumstances.

17          But that has not been understood or  
18          necessarily could fairly be understood to  
19          require a disclaimer, as a legal matter, in  
20          every setting to overcome an assertion of  
21          standing. So it may be sufficient in a  
22          particular case for a criminal prosecutor to  
23          make that kind of an assurance or disclaimer,  
24          but it's not necessary. And to make it  
25          necessary would really shift the burden away

1 from the party that's supposed to be -- the  
2 Plaintiffs, who are supposed to show that it is  
3 they who have an injury in fact, and it would  
4 shift the burden onto the Government, which  
5 would not be consistent with, for example,  
6 Clapper and other Supreme Court precedents.

7 I also think, on that disclaimer point,  
8 that part of the difficulty that that would put  
9 the Agency in is that we have a case where  
10 there's no dispute that this statute itself, it  
11 represents a congressional authorization to the  
12 Agency to conduct checkpoints of the purpose  
13 that is adequate to meet the Agency's mission.  
14 And so the notion that, somehow, the Agency  
15 could announce a disclaimer that would -- can  
16 flout the statute would, I think, be severely  
17 problematic.

18 So we do think, for those reasons, that  
19 while we understand from the Plaintiff's  
20 perspective why they might want to controvert  
21 this as a case where a disclaimer is required,  
22 that just wouldn't be consistent with the law.  
23 I'm sorry.

24 There is one point I will raise also about  
25 the orders. I stressed the orders and their

1 careful process. I do also want to note the  
2 significance of the expiration of the orders.  
3 Again, we found useful guidance by the Court's  
4 observation in the Freeman v. Keene case that  
5 involved the COVID-19 mask mandates. And the  
6 Court noted there that the expiration of the  
7 orders had a potentially significant effect on  
8 an assessment of the Article III situation.

9 We think that's informative here, where  
10 the Plaintiffs, insofar as they're relying on  
11 past injuries, are pointing to episodes -- and  
12 just momentarily holding aside the difference  
13 between the two plaintiffs in this case -- even  
14 if you're looking at 2017, '18, and '19, those  
15 orders are expired. And that has a  
16 significance, I think, that the Freeman v.  
17 Keene case rightly acknowledged.

18 I think -- as we explained in the brief,  
19 we think it's a standing question and not a  
20 mootness question. But even if the Court were  
21 to frame it as a mootness question, the  
22 declarations are clear about the current state  
23 of affairs. And there's really no reason to  
24 come to a different conclusion for standing  
25 purposes versus mootness.

1           Now, in a case where there had not been  
2       declarations of the level of detail that the  
3       Government provided, I think one might say that  
4       there was a significance to the shift from  
5       standing to mootness. We acknowledge, of  
6       course, that mootness would typically be the  
7       Government's burden to show. But because there  
8       are declarations, I don't think that difference  
9       matters. So I don't think the Court really  
10      needs to grapple with, to the extent that it  
11      feels there's a subtlety, to the question of a  
12      lack of standing versus mootness.

13           I also need to turn to this notion that I  
14      think that there is no difference, that my  
15      friend on the other side seems to be insisting,  
16      on the allegations. Again, we're looking here  
17      to the past versus the future. So the  
18      Government's position is that the Court's  
19      appropriate focus, at this stage, is on future  
20      harm.

21           And there is no reason to distinguish the  
22      two plaintiffs for purposes of future harm.  
23      Because while both reside in the area, and  
24      however frequently they may be traveling there,  
25      these plaintiffs are not alleging that their

1 past travel somehow makes it more likely that  
2 they will be subjected to checkpoints in the  
3 future, any different from regular folks who  
4 are driving through.

5 This sets us aside from a case where, for  
6 example, there might be, like, a technological  
7 reason why searching someone once makes it more  
8 likely to search them again. The plaintiffs  
9 have relied on the Alasaad district court case.  
10 And the plaintiffs in the Alasaad case pointed  
11 to an earlier case called Tabbaa against  
12 Chertoff in 2005. We're putting this out in  
13 the reply to brief.

14 In Tabbaa against Chertoff, there was a  
15 database that someone who was searched was --  
16 it had a file created. And if that file was  
17 created, then there was an allegation that that  
18 would make it more likely that someone who had  
19 been entered into that database might be  
20 searched again. There was nothing like that  
21 here. So the past and the future are, in our  
22 view, most importantly, not connected in that  
23 way.

24 But even if the Court were to look to the  
25 past, there is a significant difference between

1 the experience of Plaintiff Drewniak, where he  
2 did undergo criminal process, and the  
3 experience of the Plaintiff Fuentes. My friend  
4 on the other side seems to believe that it's  
5 appropriate to disregard the differences in  
6 those experiences, and we don't think that's  
7 consistent with either the First Circuit's  
8 precedent or the Supreme Court.

9 If I may just briefly, in the opening  
10 brief we pointed to a case called Gray against  
11 Cummings. This is a First Circuit case from  
12 2019. And the one sentence I'll flag here is  
13 that to have standing to pursue injunctive  
14 relief, "the plaintiff must establish a real  
15 and immediate threat resulting in a sufficient  
16 likelihood that she will again be wronged in a  
17 similar way."

18 And when we focus on that "wronged in a  
19 similar way," I do think that it's important to  
20 distinguish the experience of  
21 Plaintiff Drewniak from Plaintiff Fuentes.  
22 Plaintiff Drewniak underwent a criminal  
23 prosecution, and that resulted from the  
24 checkpoints that has the particular  
25 characteristics that we've described:

1           So there was a state police continuous  
2           presence. There was this former practice of  
3           surrendering evidence that was gathered at the  
4           checkpoints to the state police for the further  
5           criminal process. And, again, there were the  
6           then in place, now expired, authorizing orders.  
7           So we think the focus has to be wronged --  
8           insofar as the past is pertinent, on how they  
9           were wronged individually.

10           In that respect, Plaintiff Fuentes did not  
11           have those allegations. And so he really does  
12           rely, for Plaintiff Fuentes, on this notion  
13           that it falls on everyone. And that would be  
14           quite sweeping. It raises -- and, again, we've  
15           briefed it extensively, and I don't think the  
16           Court needs to get into these issues now about  
17           third-party standing, about seeking relief for  
18           Northern New England.

19           I understand that if -- again, to use the  
20           camera analogy, if you widen the lens to  
21           include everyone, then it might seem that you  
22           could obtain relief for all of Northern New  
23           England. But that has problems. It has  
24           Article III problems. It has Rule 12(b)(6)  
25           problems, including this third-party standing

1 point.

2 So we don't think the court needs to go  
3 there. But if the function of  
4 Plaintiff Fuentes is to broaden the case to  
5 allow the Plaintiffs to make this into the  
6 functional equivalent of a class action, as  
7 we've said in the briefs, that's very  
8 problematic. This isn't about a class action.  
9 It's an individual, two-plaintiff case. And  
10 while I appreciate the points on the other  
11 side, the focus has to be on the particular  
12 checkpoint encounters of these particular  
13 plaintiffs -- whether they can show future  
14 injury, and what relief might follow from  
15 that -- not relief that would be through  
16 Northern New England.

17 And so I do think we're in a different  
18 situation from the original complaint. The  
19 record is different. From the Government's  
20 point of view, we did carefully consider, Your  
21 Honor, the original opinion, which provides  
22 some guidance about the Court's concerns. And,  
23 I think, by giving a more careful description,  
24 just to sum up, really, about the process  
25 involved with the checkpoints, that emphasizing

1 the significance now of the expiration of those  
2 past checkpoints -- that the record is  
3 different.

4 And so this case simply is not the same as  
5 it was in 2020 when the Plaintiffs filed the  
6 original complaint. Again, there have been no  
7 checkpoints in 2020, 2021. None in 2022. And,  
8 as I said, this notion that they could occur  
9 tomorrow is just not consistent with the  
10 record. So there is, again, no certainly  
11 impeding harm, and so we would ask that the  
12 Court focus on that in granting the motion to  
13 dismiss.

14 THE COURT: Thank you.

15 Attorney Bissonnette?

16 MR. BISSONNETTE: And I promise I'll keep  
17 my rebuttal -- or surrebuttal, at this point,  
18 to a few minutes, because I know Your Honor,  
19 I'm sure, has some questions. But I want to  
20 just kind of bring this case to ground level  
21 and bring it to its core.

22 If the Government said, "Hey, there's not  
23 going to be temporary interior checkpoints  
24 until 2025," we would be in a different place.  
25 They have not said that. They won't say it in

1        declarations. They won't say it to this Court  
2        today. I think that, really, is the problem  
3        that we have as plaintiffs. At its core, we're  
4        now learning that --

5        "Okay. There now won't be checkpoints.  
6        Don't worry, there won't be checkpoints for  
7        fiscal year 2023." But this type of piecemeal  
8        approach is the very problem that we all  
9        confront, as plaintiff's lawyers, in  
10       anticipation of the potential that these  
11       checkpoints can occur at any time, representing  
12       individuals who frequently travel through this  
13       area.

14       If they said that, the case would be  
15       different. They haven't said that. And that's  
16       why we're here.

17       THE COURT: Why is 2025 a magic number, if  
18       you will?

19       MR. BISSONNETTE: I think at some point,  
20       like, it does become too remote. I freely  
21       acknowledge that. And so, I guess, in my view,  
22       2025 is less remote than right now. But right  
23       now the representation that, I think, I'm  
24       hearing from the Government is --

25       "All right. Fiscal year 2023," which ends

1 in six months. So that's the concern I have  
2 here, is that "oh, there won't be checkpoints  
3 for the next six months." And then in month  
4 seven, there could be checkpoints, and then we  
5 have to redo all of this work that we have now  
6 been doing over the past several years. But I  
7 would just look at the declarations.

8 And listening to the Government's  
9 response, there's nothing in the declarations  
10 with respect to operations orders that say, for  
11 example, "Hey, this is a cumbersome process.  
12 There are multiple layers of review, but it  
13 could take months, and months, and months.  
14 And, to the extent that that process occurs,  
15 there wouldn't be checkpoints for a year or two  
16 after an operations order." There's nothing  
17 like that.

18 Mr. -- I think one affidavit, document  
19 Number 73-2, "Depending on the nature and scope  
20 of the operation order," paragraph 12, "various  
21 levels of review and approval occur before the  
22 order is finalized, approved, and executed."  
23 Okay. That process can take a day, take a  
24 week. I mean, there's nothing here that says,  
25 again, that an operation order can't be

1 fast-tracked, expeditiously done, and a  
2 checkpoint can't occur tomorrow.

3 So I think we're hearing a lot of extra  
4 things, I think, about operations orders during  
5 this argument that I don't think are reflected  
6 in the record. But what is reflected in the  
7 record, when you look at that same affidavit --  
8 and now I'm moving to page -- to paragraph 33  
9 and 34. In particular, 34, "The location and  
10 operation of any future immigration checkpoint  
11 within the Swanton Sector is subject to change  
12 based on a variety of factors to include, among  
13 other things, logistics, law enforcement needs,  
14 staffing, budgetary considerations."

15 They could happen tomorrow. Now, they're  
16 saying that maybe that's not the case today.  
17 That's not in the affidavits. And that is, I  
18 think, the fundamental concern I have with  
19 where we are. Now, we could take discovery on  
20 all of this, and maybe that's an appropriate  
21 vehicle for resolving some of these things, is  
22 I could sit down with Mr. Garcia and ask him  
23 about all these things, ask him about the  
24 framework that this Court provided two years  
25 ago, and ask him probing questions about that

1 to get to the bottom of some of these things.

2 But the way that the record currently  
3 exists, notwithstanding what we're hearing  
4 today from the Government, is that I think  
5 operations orders can be issued at any time,  
6 and we could be subjected to these -- our  
7 clients could be subjected to these particular  
8 checkpoints.

9 I do want to address the issue of mootness  
10 versus standing. I don't want to get too  
11 caught up on it, to some extent because I  
12 freely concede and acknowledge that with  
13 respect to Mr. Fuentes, it is a standing  
14 analysis. And his standing analysis is based  
15 on the allegations that are in the second  
16 amended complaint. We don't think Mr. Drewniak  
17 is, but I just wanted to kind of appreciate and  
18 be explicit about that particular distinction.

19 But I do think the Alasaad case provides  
20 some insight here which this Court relied upon  
21 on its initial ruling. There the Court  
22 concluded that the Plaintiff's allegations of  
23 future travel were sufficient at the motion to  
24 dismiss stage, even though they were -- they  
25 omit specific plans or dates of future travel,

1 where the Plaintiffs allege that they regularly  
2 travel to the relevant location. I mean,  
3 that's what we have here, certainly, with  
4 Mr. Fuentes.

5 With respect to, again, the disclaimer  
6 itself, I understand, of course, the  
7 Government's civil disclaimer is not required.  
8 I'm not saying it's required, but absent a  
9 disclaimer in this case, we believe that  
10 standing exists as alleged.

11 And, I think, lastly, obviously, the  
12 Government talks about its law enforcement  
13 obligations. No dispute about that. There are  
14 obligations, obviously, to keeps us all safe,  
15 to patrol the borders. No question about it.

16 But, of course, the statute that  
17 authorizes checkpoints doesn't mandate  
18 checkpoints, doesn't require that they actually  
19 occur, number one. And, number two, of course,  
20 those activities need to be subjected to the  
21 Fourth Amendment. They are subjected to the  
22 Fourth Amendment. That is what the Edmonds,  
23 right, was all about.

24 So the final point I want to make is what  
25 I think is a little bit of, again, a red

1 herring as well with respect to third-party  
2 standing.

3 "Oh, this is complicated. There's  
4 potential for a class action." This isn't a  
5 class action. It doesn't need to be a class  
6 action. All that's required is that our  
7 clients have the ability and standing to seek  
8 injunctive relief, which they do here. It  
9 doesn't matter whether that injury is impacted  
10 by other individuals.

11 FEC versus Akins -- last thing I'll say,  
12 Your Honor -- "Often the fact that an interest  
13 is abstract and the fact that it is widely  
14 shared go hand-in-hand, but their association  
15 is not invariable. And where a harm is  
16 concrete, though widely shared, the Court has  
17 found an injury in fact."

18 Same as the case here. Yes, this injury  
19 is shared by other individuals -- thousands of  
20 individuals, in fact. But our clients, we  
21 believe, are likely to be injured by this  
22 practice in the future.

23 Thank you.

24 THE COURT: Attorney Sur, any response at  
25 all? Is there any guarantee that there will be

1 no checkpoints through 2025? And we can call  
2 it a day.

3 MR. SUR: I appreciate the question, Your  
4 Honor.

5 To my understanding, the 2025 is not a  
6 specific time period for which the Plaintiffs  
7 sought a written assurance in their briefs. If  
8 they did specify that as sufficient to resolve  
9 the case in their briefs, I missed that, but  
10 it's news to me. I think, as I said in the  
11 preparation for oral argument, recognizing the  
12 Court might choose to examine various time  
13 periods, I can give the agencies assurance of  
14 about up to fiscal year 2023, but I do  
15 understand that Plaintiffs -- to be not  
16 satisfied by that.

17 And so, at this point, I really would need  
18 to confer with the clients about this argument  
19 about 2025, noting that the problem, of course,  
20 which I alluded to before, I think, in the  
21 declarations, which is that I think it's  
22 difficult to make a commitment when the future  
23 is so uncertain. And I'm, actually, almost not  
24 sufficiently well versed in baseball lore to  
25 make this reminder, but there is an aphorism

1       that's attributed to Yogi Berra about how  
2       difficult it is to make predictions, especially  
3       about the future. I do think that applies with  
4       some force here and underlies some of the  
5       difficulties that are presented by the  
6       Plaintiffs' claims.

7               I will also respond to the notion that  
8       this isn't a class action and it doesn't need  
9       to be a class action. Certainly, the  
10      Government agrees that this is not a class  
11      action. And so that's why it would be  
12      appropriate to limit any relief sought for  
13      Article III reasons and for Rule 12(b)(6)  
14      reasons on this amended complaint, to focus  
15      that on the plaintiffs and to, at a minimum,  
16      limit whatever further proceedings take place  
17      to the Plaintiffs, rather than this notion that  
18      the Plaintiffs stand for everyone who might  
19      possibly be affected by the operations in,  
20      quote, "Northern New England."

21             FEC against Akins involved a statutory  
22      right to certain information, and whether that  
23      was sufficient under Article III. We don't  
24      think an informational analogy is really  
25      appropriate here. Rather, we're talking about

1 a Fourth Amendment right. And, as we explained  
2 in the briefs, the Fourth Amendment, by itself,  
3 hasn't always been understood -- or has  
4 traditionally been understood, for decades, to  
5 be an individual right, where we would expect  
6 those other motorists to seek their own  
7 counsel, and to bring their own claims, as  
8 appropriate, including under traditional  
9 motions to suppress evidence, if that were  
10 appropriate.

11 And even apart from that Fourth Amendment  
12 limitation on the third-party standing, as we  
13 said in the briefs, there isn't the requisite  
14 closeness between these plaintiffs and those  
15 absentee motorists, and there is not any  
16 hindrance to those absentee motorists bringing  
17 their own claims. So I think it is important  
18 that -- I guess there's some agreement on  
19 this -- that this is not a class action, and,  
20 so, accordingly, it shouldn't be treated as  
21 such.

22 THE COURT: All right. Well, let me do  
23 this. I do want to issue rulings in the case,  
24 keep the case moving to the extent it has  
25 merit. This is still fairly early in the case.

1 I am going to -- I've listened carefully  
2 to everything that's been argued, and I've read  
3 everything on paper as well. And I'm going to  
4 issue a ruling orally, right now, on the motion  
5 to dismiss, and then we'll move to the motion  
6 to compel.

7 Defendant's move to dismiss Plaintiffs'  
8 amended complaint for lack of standing under  
9 12(b)(1), the Federal Rules of Civil Procedure.  
10 Defendants also raise a few other arguments  
11 that appear to be under 12(b)(6). Both the  
12 12(b)(1) and 12(b)(6) standards are outlined in  
13 my prior orders in the case. They remain the  
14 same here, so I'm not going to repeat them.

15 Before getting into the standing issue,  
16 there is a preliminary dispute about whether,  
17 as to Drewniak, the Court should analyze the  
18 issue under the standard for mootness or  
19 standing. Standing is determined in relation  
20 to the facts that exist at the commencement of  
21 litigation, while mootness considers whether  
22 intervening events have changed circumstances  
23 such that the issues presented are no longer  
24 live, or the parties lack a legally cognizable  
25 interest in the outcome.

1           The parties' dispute centers around what  
2           "commencement" means. Is it limited to the  
3           filing of an initial complaint which begins the  
4           case? Or is a case commenced when an amended  
5           complaint is filed? I do not need to answer  
6           this question directly, because the facts are  
7           sufficient, in my view, to deny the motion  
8           under either standard.

9           So, in other words, the facts are  
10          sufficient to deny Defendant's motion of  
11          considered under the standard for mootness,  
12          which, in the context of this case, requires  
13          the Defendants to show that there is no  
14          reasonable expectation that the wrong will be  
15          repeated such that it is impossible for the  
16          Court to grant any effectual relief whatever to  
17          the prevailing party. And I cite City of Eerie  
18          for that proposition. Defendants have not  
19          carried that burden.

20          The facts are sufficient to find standing  
21          at this stage. First, as to standing,  
22          Plaintiffs, as the parties invoking federal  
23          jurisdiction, have the burden. Standing has  
24          three prongs -- the Plaintiff suffered an  
25          injury in fact; the injury is fairly traceable

1 to the challenged action of the defendant; and  
2 it is likely, as opposed to merely speculative,  
3 that the injury will be redressed by a  
4 favorable decision.

5 We're primarily focused here on the first  
6 prong, injury in fact, and, in particular,  
7 whether Plaintiff's alleged injury is actual or  
8 imminent as opposed to conjectural or  
9 hypothetical. As explained in the Court's  
10 order denying Defendant's first motion to  
11 dismiss, when a Plaintiff seeks injunctive or  
12 declaratory relief, the Plaintiff must show a  
13 threatened injury that is certainly impending  
14 or that is a substantial risk that the alleged  
15 injury will occur.

16 That order contains all the case law and  
17 citations necessary to resolve this second  
18 motion to dismiss, so I'll refer the parties  
19 back to that order for the relevant legal  
20 authorities which remain good law today. The  
21 difference is in the relevant facts between the  
22 initial complaint and the amended complaint to  
23 not change the outcome, at least as far as  
24 Article III's standing is concerned. In short,  
25 these differences are Drewniak's representation

1       that he will drive to the White Mountains less  
2       frequently than he had anticipated when  
3       bringing the initial complaint, and the  
4       addition of Fuentes, who has alleged several  
5       new facts in support of standing as a  
6       Plaintiff.

7               I find Drewniak's facts are sufficient for  
8       standing. I don't find the change in his  
9       circumstances significant. The COVID-19  
10      pandemic, his work schedule, and his family  
11      emergency have changed the frequency in which  
12      he intends to recreate in the White Mountains.

13             As the Court previously found, Drewniak is  
14      an avid outdoorsman who regularly takes trips  
15      to the White Mountains via the roads where  
16      Defendants have set up checkpoints in the past.  
17      Those facts have not changed. Drewniak still  
18      intends to travel to the White Mountains for  
19      recreation. There's no reason to believe that  
20      he won't continue to go to the White Mountains,  
21      since he has even in the recent past, although  
22      less frequently.

23             As to Mr. Fuentes, he alleges that he  
24      lives close to Woodstock and frequently travels  
25      in the locations where the Woodstock

1 checkpoints have occurred, in addition to  
2 having actually traveled through the  
3 checkpoints when they were ongoing. At a  
4 minimum, he passes through that area about two  
5 times per week.

6 Now, I've already considered and rejected  
7 the Defendant's argument that standing is  
8 lacking because border patrol does not  
9 currently have plans for future checkpoints. I  
10 already rejected the argument that Plaintiffs  
11 lack standing because border patrol does not  
12 have current plans for future checkpoints  
13 anywhere in New Hampshire, as well as their  
14 argument that the New Hampshire State Police  
15 will not be continuously present at future  
16 checkpoints.

17 As stated in that order, the Court cannot  
18 conclude from the mere fact that no checkpoints  
19 are currently scheduled that additional  
20 checkpoints are unlikely. So, in summary, I  
21 find that the circumstances alleged in the  
22 amended complaint, alongside the facts from the  
23 declarations submitted by the parties are not,  
24 in a material way, different from the  
25 circumstances I found to be sufficient for

1 standing when denying the first motion to  
2 dismiss.

3 I find that the allegations and facts both  
4 parties have proffered as to standing are  
5 sufficient to show that Fuentes and Drewniak  
6 have suffered an injury in fact, and that they  
7 are real and not hypothetical injuries. And I  
8 find there is a substantial risk that the  
9 injuries will reoccur, for the same reasons I  
10 found that when I denied the Defendant's first  
11 motion to dismiss.

12 The other arguments in support of  
13 dismissal we didn't spend much time on today,  
14 but let me just put on the record. I think I  
15 can address these fairly quickly. First, the  
16 Defendants argue the Court should dismiss  
17 Plaintiffs' constitutional claims or otherwise  
18 refocus Plaintiffs' complaint on an APA claim  
19 that Plaintiffs' did not assert. Defendants  
20 cite no authority, and the Court's not aware of  
21 any authority, that permits the Court to  
22 effectively amend a complaint to add a claim  
23 that the plaintiff does not wish to assert.

24 Furthermore, even if the Court had  
25 authority to add an APA claim to this case

1       against Plaintiffs' wishes, it would not  
2       necessarily demand dismissal of their  
3       constitutional claim at this stage.  
4       Constitutional avoidance means, in summary,  
5       avoiding unnecessary decisions interpreting or  
6       applying constitutional rules. It does not  
7       require the Court to dismiss constitutional  
8       claims at the outset of a case because the  
9       Plaintiff might ultimately prevail on a  
10      statutory claim that's premised on the same  
11      alleged misconduct.

12             And, then, also, Defendants argue the  
13      Court should dismiss Plaintiffs' complaint  
14      because the injunction requested by Plaintiffs  
15      is overbroad. They also argue the declaratory  
16      relief is unwarranted because of considerations  
17      of practicality and wise judicial  
18      administration. These arguments are premature.  
19      At this stage, the Court is not deciding what  
20      relief is warranted or unwarranted. Plaintiffs  
21      have done what is necessary at this stage,  
22      which is to show the Court can redress their  
23      injuries through injunctive or declaratory  
24      relief.

25             Beyond that, I do not see why the Court,

1 at this stage, must decide exactly what that  
2 relief looks like. So for these reasons,  
3 Defendant's motion to dismiss, which is  
4 Document Number 73, is denied. But let me move  
5 now to the motion to compel.

6 Let me start by just asking the ACLU on  
7 this one -- obviously, if I just agree to  
8 conduct an in-camera review, look at this  
9 material -- I know you're arguing they haven't  
10 met the burden to warrant that -- that could  
11 shortcut, obviously, this hearing. And I  
12 wonder if, ultimately -- I'd like to ask some  
13 questions before I would decide that.

14 But, ultimately, I'm wondering if the  
15 Government's proposal that I conduct in-camera  
16 review makes any sense and is something you'd  
17 be agreeable to.

18 MR. BISSONNETTE: Yeah. I think that's a  
19 great question, Your Honor, and it's certainly  
20 a prudent one.

21 I do want to say at the outset, before,  
22 maybe, there's substantive discussion of this  
23 motion, that portions that I'm -- that I have  
24 received portions under an attorney's-eyes-only  
25 protective order. There are, obviously, still

1 portions of the operations orders that I  
2 haven't seen that I know that you're  
3 acknowledging would be subject to in-camera  
4 review. I only say that, Your Honor, because  
5 I'm going to be -- I may be cryptic at times  
6 about what I'm saying because this is a public  
7 hearing and I know there's at least one member  
8 of the press present. So I just want to convey  
9 my mindfulness of that.

10 I don't think there's any, I think,  
11 inherent concerns, necessarily, with that. I  
12 know that with in-camera process, I know we  
13 have some concerns about whether the threshold  
14 has been met to justify in-camera review. I  
15 would not be doing my job if I didn't convey  
16 some concerns I would have with respect to the  
17 fact that I wouldn't have an opportunity, as  
18 part of that in-camera process, to review the  
19 materials and then argue before the judge --

20 "Hey, this is why this is relevant." That  
21 is, I think, one of the potential drawbacks of  
22 the in-camera process, is that -- you know, I  
23 know our claims. I know why we're seeking  
24 information. I know kind of what elements I  
25 need to be able to prove, or try to prove, to

1 establish my case. I know Your Honor has far  
2 more cases than I do, and will be less familiar  
3 with it.

4 So there is maybe, I think, a mild concern  
5 about this kind of evolving into a  
6 non-adversarial process, where I don't have an  
7 opportunity to explain, for example, even if  
8 the privilege applies, why the privilege has  
9 been overcome because of substantial need,  
10 which is something I need to show. So I have  
11 no objection to the Court --

12 THE COURT: I understand that. I think  
13 that's a fair concern. It's a concern I have,  
14 frankly, when I'm looking at the material.

15 How am I able to do an effective balancing  
16 analysis if I'm not clear on precisely why  
17 something might be relevant to this case? Let  
18 me do this, then. Let's go through this pretty  
19 quickly.

20 I'm going to go through categories, and  
21 maybe you can get me a sense,  
22 Attorney Bissonnette, as to what would I -- I  
23 mean, obviously, you don't know what you don't  
24 know. But let's start -- I'm looking at the  
25 affidavit in the case that the Government

1 filed -- Chief BeMiller (phonetic). And it  
2 seems to me that contains, starting at page, I  
3 think -- well, paragraph 23, he starts going  
4 through the particular redactions. And if I  
5 miss any, obviously, circle back, but paragraph  
6 23-A.

7 Why would you need internal case numbers  
8 that track a variety of different cases wholly  
9 unrelated to the present one?

10 MR. BISSONNETTE: We do not. And I think  
11 in our reply, I tried to focus it. But I  
12 understand your question, and I don't think  
13 that's something that I need, Your Honor.

14 THE COURT: Okay. All right.

15 And then let's go to B, Staffing Numbers  
16 and Associated Costs. This could be used,  
17 according to the Government, to predict future  
18 vulnerabilities. If they know that, for  
19 instance, they have certain staffing problems  
20 at particular checkpoints, it could increase  
21 the likelihood of officer safety, just patrol  
22 vulnerabilities.

23 So Staffing Numbers of Personnel and  
24 Associated Costs -- give me a sense of that  
25 category, as you vaguely understand it.

1 MR. BISSONNETTE: Sure.

2 With respect to staffing number, I  
3 actually think that is germane. One kind of  
4 key component of the checkpoints that, without  
5 getting too into the details that we're  
6 concerned about, is really the use of K-9s and  
7 K-9 teams that are used in the primary  
8 inspection area. And I think it's important  
9 for us to know the degree to which that is  
10 occurring. How extensive is it occurring? Is  
11 it one team, or is it ten teams? That is kind  
12 of part of the intrusion that, I think, we are  
13 concerned about that is endemic to everybody  
14 that goes through the checkpoints, it seems.

15 But I just would need a way to verify that  
16 in discovery. I would note that in discovery,  
17 the K-9 component of this case is going to be  
18 really critical. And I think that is one of  
19 the reasons why I think staffing is important  
20 to us, Your Honor.

21 THE COURT: Okay. So it's primarily the  
22 number of K-9s that are available to CBP to  
23 potentially conduct one of these checkpoints?

24 MR. BISSONNETTE: Yes, Your Honor.

25 THE COURT: And, ultimately, when this --

1 in 23-B, when the words "staffing numbers" --  
2 that includes humans as well as K-9s? And  
3 you'd be interested in both of those,  
4 Mr. Bissonnette?

5 MR. BISSONNETTE: Yes, Your Honor.

6 THE COURT: Okay. All right.

7 And then 23-C, Patrol Area Designation,  
8 and Miles Within a Station. It's a small  
9 location. That's another issue of revealing  
10 gaps on the border. And that's -- that creates  
11 concerns that it would result in an increase in  
12 illegal immigration at certain spots.

13 MR. BISSONNETTE: Yeah. This is  
14 difficult, I'm going to confess, Your Honor.  
15 And the reason why is because these operation  
16 orders are basically, like, justification for  
17 why these checkpoints are necessary. And it's  
18 hard for me to know -- maybe that's something I  
19 don't need; maybe it is. Maybe what the  
20 operations orders say, and I don't know, one  
21 way or the other, is these checkpoints are  
22 needed because of the patrol area problems  
23 somewhere.

24 I think that's germane to the analysis of  
25 the justification of the checkpoints, which I

1 have to show they're not justified under the  
2 Fourth Amendment analysis. So, at a high  
3 level, I think that's kind of some of my  
4 concern here. And I do want to flag, again,  
5 this is why we have a protective order. We  
6 negotiated that exhaustively to try to address  
7 that.

8 THE COURT: Right. I -- now, what if --  
9 let me ask the Government this.

10 What if you removed the specific name of  
11 the location? And, that way, that is not  
12 something that would be remotely at risk of  
13 inadvertent disclosure, so that you are not  
14 designating a particular station or location,  
15 but you're revealing staffing and resource  
16 distribution along the United States-Canadian  
17 border; what do you think of that possibility?

18 MS. DRONZEK: So I understand, I think,  
19 what the Court is getting at in terms of is  
20 there a way that we can reveal things that are  
21 pertinent to the Plaintiffs' needs here?

22 My concern would be that we are talking  
23 about a relatively small area. And so my  
24 concern, at this point -- without having an  
25 opportunity to consult with people who are

1 actually on the ground addressing the  
2 patrolling, my concern would be that is there a  
3 kind of a way that we can redact certain  
4 elements and provide other ones that would not  
5 pose such a risk? And, unfortunately, I'm not  
6 in a position to say for certain whether that's  
7 the case.

8 I will say that the Government has really  
9 tried to operate in good faith and to negotiate  
10 the degrees of the redactions, and has gone  
11 back and forth, a number of times, to reach  
12 what we have here.

13 And so it may be that the Government's  
14 response is going to be, "No, that's not  
15 sufficient. This really needs to be completely  
16 redacted." I'm afraid I can't give a complete,  
17 concrete answer at this point without, as I  
18 say, consulting further with those who  
19 actually --

20 THE COURT: Okay. And it looks like 23-C  
21 actually discloses already. I mean, it's  
22 stating in a public document that there's this  
23 small location within the Beecher Falls station  
24 that had gap issues.

25 I'm just wondering how much more needs to

1 be redacted to deal with this issue. It seems  
2 as though it's somewhat partially disclosed.  
3 The concern has, at least, been disclosed. But  
4 I'll move on to the next one. I'm just trying  
5 to get a sense of where you both come down on  
6 the -- D, again, is sort of related to C --  
7 Operational Impediments, in Particular  
8 Geographic Areas. So I'm assuming that deals  
9 with that same issue we just talked about.

10 MR. BISSONNETTE: Yes. I think that's  
11 right, Your Honor. Thank you.

12 THE COURT: All right. Now, E -- this one  
13 caught my attention, obviously. That seems  
14 fairly concerning.

15 Intelligence Information and Case Numbers  
16 that Relate to Ongoing Investigations. And I  
17 can see also where this may be of heightened  
18 relevance to Plaintiffs as well.

19 So, again, I think I could look at the  
20 redacted material and get a sense of what I  
21 would be required to decide as I balance  
22 Plaintiffs' interest in having the info, and  
23 the Government's interest in keeping it forever  
24 secret. But I'm not sure if -- this one seems  
25 to come the closest to that Second Circuit

1 decision that the Government's relying on, in  
2 general. Although that case is so  
3 distinguishable from this case because it  
4 involved ongoing investigations all over the  
5 City of New York. It involved confidential  
6 informants. It involved undercover agents.  
7 And it -- the likelihood that somebody's  
8 identity could be released would harm an  
9 investigation of wide scope in the City of New  
10 York -- it just -- to me, I'm reading through  
11 these and I -- I'm concerned that the  
12 protective order -- it seems to me that that's  
13 the best way to handle this situation.

14 Because it allows for Plaintiffs to look  
15 at each piece of evidence and decide whether or  
16 not they're going to use it in their case in  
17 chief. It's hard to ask the Court to look at  
18 this information and weigh it in-camera. But  
19 it's certainly a possible step that I could  
20 take. Did you -- I think there is one that  
21 deals with radio frequencies.

22 Did you also disclaim any interest in  
23 that?

24 MR. BISSONNETTE: You know, I'm not  
25 entirely sure if we did in our briefs. And, if

1 I didn't, my apologies. But, no, that's not  
2 something I'm particularly interested in, nor  
3 do I think it's relevant to our claims.

4 THE COURT: Okay. I can't find that one  
5 as I look at this --

6 MR. BISSONNETTE: Sure. That's been --

7 THE COURT: Oh, it's F. F -- right. I  
8 was just about to get to that. So that one  
9 makes sense to me that that would not be  
10 something you would need.

11 And then the rest of these are kind of  
12 relatively similar to what you already talked  
13 about, Attorney Bissonnette, in terms of  
14 potential relevance. But internal tracking  
15 mechanisms -- did you disclaim a need for that?  
16 That goes down now to the Operations Checklist  
17 section, which is paragraph 26.

18 MR. BISSONNETTE: Got you.

19 THE COURT: It's an alphanumeric code for  
20 case number --

21 MR. BISSONNETTE: Yeah -- I'm sorry to  
22 interrupt you, Your Honor. My apologies.

23 THE COURT: No, go ahead.

24 MR. BISSONNETTE: I think that would be  
25 the same situation. I don't think that's

1 something that we would need. And if I didn't  
2 specifically disclaim that, my apologies. But,  
3 no, that's not really what we're looking at.

4 As I think Your Honor has mentioned,  
5 anything related to the justification, the  
6 nexus to any potential criminality is one of  
7 our key themes or key arguments, anyway, that  
8 the primary purpose is criminal in nature.  
9 Which is why some of these categories we  
10 previously addressed have kind of a nexus to  
11 our case theory.

12 THE COURT: Okay. So, really, would you  
13 say that entire section, paragraphs 24 through  
14 27D, the Operations Checklist -- is that  
15 something you can disclaim, or just paragraph  
16 26?

17 MR. BISSONNETTE: I'd have to go through  
18 the checklist again. My apologies, Your Honor.  
19 I don't know if I'm prepared to say that.  
20 Certainly with respect to 26 and internal  
21 tracking mechanisms.

22 Is it okay if I give some more thought to  
23 this, Your Honor?

24 THE COURT: Of course. I'm inclined to go  
25 ahead and do an in-camera review, but I'm also

1 respectful of your concerns about that. And,  
2 frankly, as a practical matter, I want to,  
3 obviously, take the Government's security  
4 concerns and balance those against the  
5 relevance in the case. And so, ultimately,  
6 that's going to rest on me. And I know there  
7 are only 92 pages, so that's not daunting. I  
8 can do that.

9 But -- and I can give it a first shot,  
10 obviously. And I have not ever had to do this  
11 with regard to an in-camera review, but I can  
12 envision having a sealed hearing where I ask  
13 the Government specific questions. And,  
14 obviously, without revealing the matter, say,  
15 the Government wants to be sealed, could direct  
16 my attention to certain things.

17 In other words, before I make a final  
18 decision, I could have some sort of sealed  
19 proceeding. Not ex parte, but sealed, where we  
20 would be careful, even then, in terms of  
21 revealing what my questions are and what  
22 material is being redacted.

23 So, ultimately, I think I'm inclined to  
24 just go ahead and give it a careful review and  
25 attempt to do the balancing test. And to the

1 extent I don't feel I'm able to do that, I may  
2 come back to counsel.

3 Would the Government be filing with the  
4 proposed redaction and ex parte submission in  
5 addition to the redactions?

6 MS. DRONZEK: I mean, we can certainly do  
7 that if that's how the Court would like to  
8 proceed. I understand that might be helpful  
9 for you in terms of understanding our  
10 perspective on why these redactions are  
11 necessary. Again, the information -- it would  
12 not be materially different, I think, from what  
13 is in the declaration that you already have.  
14 But, to the extent it is helpful, the  
15 Government is willing to do that.

16 MR. BISSONNETTE: Your Honor, I can talk  
17 about the checklist, as well, when you have a  
18 moment. I'm sorry.

19 THE COURT: Okay. I think I could be  
20 prepared, based on what Attorney Bissonnette  
21 has generally described as his needs for the  
22 material. But if it comes to a point where I  
23 am not able to discern the possible relevance,  
24 that's when I'm thinking I might want to have  
25 some sort of proceeding where the Government --

1 I will not reveal what's in the documents, but,  
2 ultimately, I could describe a scenario and ask  
3 Attorney Bissonnette -- or Attorney Stark --

4 "How would this possibly -- something like  
5 this be relevant to your case?" And see if I'm  
6 able to make that determination. Hopefully,  
7 what you've already told me,  
8 Attorney Bissonnette, will be sufficient for me  
9 to have a sense of what might be relevant.

10 So I think what we can do, then, is just  
11 get me the -- I'm going to go ahead. I have  
12 some doubts about whether or not this rises to  
13 the level of the kinds of security-related  
14 material that a protective order isn't even  
15 enough for.

16 It's hard for me to get a sense of that,  
17 and I see it as different than the cases where  
18 Courts have said, "We do not want to risk even  
19 the slightest accidental disclosure." I would  
20 much prefer that a protective order be utilized  
21 by the parties here. And, that way,  
22 Attorney Bissonnette is bound by that  
23 protective order and, ultimately, has access to  
24 material that he deems relevant, and doesn't  
25 use anything else that, obviously, would be

1 attorney's eyes only.

2 My guess is it would be material he  
3 wouldn't necessarily have to disclose to his  
4 clients. I know that the Government made that  
5 argument that this would only be useful for him  
6 if he could talk to his clients about it. But  
7 I think that coming up with theories of the  
8 case, and finding evidence to support whatever  
9 theories you're putting forth -- I think that  
10 could be done attorney's eyes only.

11 But I'm going to respect the Government's  
12 assertions here. And I certainly am willing to  
13 do an in-camera review and see what I -- and if  
14 I have doubts, Attorney Bissonnette, about the  
15 balancing test, I think what I would do is come  
16 back and, in an opaque way, try to discern  
17 whether or not something could be relevant to  
18 your case.

19 MR. BISSONNETTE: Understood. Thank you,  
20 Your Honor --

21 THE COURT: How does that sound?

22 MR. BISSONNETTE: That sounds fine, Your  
23 Honor, to the Plaintiffs. I can close the loop  
24 on the checklist --

25 THE COURT: Yeah, go ahead.

1 MR. BISSONNETTE: -- if that's helpful.  
2 I've pulled -- there's multiple versions --  
3 publicly filed versions versus under seal.

4 It does look to me, just having pulled the  
5 sealed version, without disclosing the  
6 contents, that the redactions do appear to be  
7 limited to internal tracking of an operation  
8 name. That's the information that I do not  
9 have. I do not think I need that.

10 THE COURT: Okay.

11 MR. BISSONNETTE: So in an effort to kind  
12 of close the loop on checklists, I think -- I  
13 feel like I'm pretty comfortable on the  
14 checklist situation assuming that elsewhere,  
15 there are more redactions for us.

16 But I'm basing that off of, Your Honor,  
17 Exhibit F to the motion to compel that's under  
18 seal, Bates stamped, in the sealed version,  
19 Drew-PROD-035.

20 THE COURT: And I'm looking at an  
21 affidavit. Is this under seal, the affidavit?

22 MS. DRONZEK: The affidavit is not under  
23 seal, Your Honor, no. And that is what the  
24 BeMiller affidavit does make clear, that the  
25 only redactions to the checklist as opposed to

1 the operation orders and the executive  
2 summaries was the internal tracking numbers.

3 So what Attorney Bissonnette has said is  
4 correct, to my understanding. So we should be  
5 -- you had asked about paragraphs 24 through  
6 27, and only paragraph 26 addressed what  
7 redactions. The others are simply descriptions  
8 of the items, so they don't need to be  
9 addressed separately, I think.

10 THE COURT: Okay. Good. I'm not sure how  
11 many documents that will mean that I -- how  
12 many fewer documents I look at. But what I  
13 would suggest, then, is that you go ahead and  
14 file those for in-camera review, and I will try  
15 to turn this around for you as quickly as I can  
16 to the extent I need a further proceeding.

17 And I said that would be sealed or -- it  
18 may not need to be, ultimately, because I would  
19 be opaque in my descriptions of the redactions  
20 anyway. So I'll think about that to the extent  
21 I'll need that. I'll, obviously, let counsel  
22 know, and we can get on a further video  
23 hearing. But, hopefully, this will be very  
24 clear to me. That's what I'm hoping. So I'm  
25 going to do the in-camera review and give you a

## HEARING

66

1 ruling on that.

2 So is there anything further I need to  
3 accomplish today?

4 MR. BISSONNETTE: Not for the plaintiffs,  
5 Your Honor, unless my co-counsel texted me. I  
6 think we're fine.

7 THE COURT: Okay. All right.

8 Then it's good to see everybody. Thank  
9 you very much. And court is adjourned.

10 (The proceedings were adjourned at  
11 12:24 p.m.)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## HEARING

67

## C E R T I F I C A T E

I, Molly K. Belshaw, a Licensed Shorthand Reporter for the State of New Hampshire and Registered Professional Reporter, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceeding taken at the place and on the date hereinbefore set forth to the best of my skill and ability under the conditions present at the time.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken, and further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/ or direction of the certifying reporter.



Molly K. Belshaw  
RPR, LCR No. 00162